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No. 90-907

In The

Supreme Court of the United States

October Term, 1990

GAETANO VASTOLA,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Third Circuit

REPLY BRIEF FOR PETITIONER

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REPLY BRIEF FOR PETITIONER

1. The Brief for the United States in Opposition contends that Petitioner's "claim" is not ripe for review by this Court because neither the district court nor the court of appeals has yet decided the ultimate issue. Nowhere in its brief, however, does the United States even mention the claim which Petitioner has actually raised in his certiorari petition: that the court of appeals, on remand from this Court, ignored the plain language of 18 U.S.C. § 2518(8)(a) and *United States v. Rios*, 110 S.Ct. 1845 (1990), in holding that it is a matter committed to the district court's "discretion" whether the Government may

supply an explanation for a sealing delay for the first time after appeal. Petitioner submits that this question presents a concrete controversy warranting review.[1]

In order to impart to this case an aura of prematureness, the United States gives inordinate and misplaced weight to an incidental part of the court of appeals' decision dealing with harmless error. The court of appeals stated that "[i]n view of our decision to remand this case, we do not reach the question of whether the

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[1] The United States inaccurately, and self-servingly, frames the issue as follows:

> The question whether to permit a district court to address a legal issue in the first instance, and to hold any evidentiary hearing that may be necessary to the disposition of that issue, is a question committed to the judgment of the court of appeals, see 28 U.S.C. 2106. Accordingly, the question whether it was appropriate for the court of appeals to remand this case for initial consideration by the district court is a narrow and fact-bound inquiry in an area in which the courts of appeals enjoy broad discretion. (U.S. Brf. 6)

If the question were merely whether it was proper for a court of appeals to permit a district court "to address a legal issue in the first instance," a question to which the answer is obviously yes, Petitioner would not have brought this petition. The question actually presented centers on the *court of appeals'* legal determination that it is a matter committed to a district court's "discretion" whether the Government may supply an explanation for a sealing delay for the first time after appeal. Petitioner contends that the answer is dictated by § 2518(8)(a) and *Rios* and that there is nothing "discretionary" about it.

Moreover, there is absolutely nothing "fact-bound" about this question.

admission of the West Long Branch tapes could be considered harmless error." (App. 29) The court concluded: "Considering that a possibility exists that the sealing delay will be satisfactorily explained, we think it best not to pass judgment on the murkier question of the harmlessness of the purported error. If necessary that issue may be reached on remand." (App. 31)

It is clear from the foregoing that the matter was not remanded *in order to* to determine whether the error may be harmless. Rather, the decision to remand having already been made, the court of appeals suggested that the district court may also wish to address the issue of harmlessness. Obviously, had the court of appeals itself resolved the issue of whether the Government was barred from supplying and explanation for the sealing delay at this juncture of the litigation, as Petitioner submits the court of appeals was obliged to do, that court would then have addressed the question of harmlessness itself. Indeed, it is rather unusual for a court of appeals to invite a district court to assess in the first instance whether an error raised on appeal may be harmless.

Had the court of appeals not improperly remanded the matter to the district court, but decided the issue according to the dictates of 18 U.S.C. § 2518(8)(a) and *United States v. Rios*, its decision, and any harmless error analysis, would have been dispositive of the case. Consequently, this matter is ripe for review. If this Court were to agree with Petitioner, the matter either could be disposed of here or could properly be remanded to the court of appeals for ultimate disposition, without any need for a remand to the district court.

2. In describing the district court's pretrial ruling on Petitioner's motion to suppress, the United States states: "Because the district court found that the integrity of the tapes had not been questioned, the court did not require the government to explain the reason for the sealing delay. 670 F. Supp. 1244, 1282." (U.S. Brf. 2) This statement may create the erroneous impression that the district court affirmatively dispensed with the need for any explanation by the Government. It did not. What "required" the Government to explain the reason for the sealing delay was not the district court, but 18 U.S.C. § 2518(8)(a). *United States v. Falcone*, 505 F.2d 478 (3d Cir. 1974), required the same thing, as explained in the Petition at 17-19. That the Government, in declining to offer an explanation, may have taken comfort in *Falcone's* assurance against suppression was not a reasonable basis for ignoring what the law required.

CONCLUSION

The petition for a writ of certiorari should be granted.

Dated: New York, New York
February 12, 1991

Respectfully submitted,

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